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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of JAMES J. ISAACS and JANETTE M. ISAACS.	B207782
JAMES J. ISAACS, Respondent, v. JANETTE M. ISAACS, Appellant.	(Los Angeles County Super. Ct. No. BD403783)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas Trent Lewis, Judge Presiding. Affirmed.

Janette M. Isaacs, in pro per, for Appellant.

James L. Keane for Respondent.

Janette Isaacs appeals from the judgment entered in a bifurcated trial to resolve certain issues relating to the date of separation, characterization and division of property, credits and reimbursement claims and spousal and child support in the marital dissolution proceedings between appellant and respondent, James Isaacs. Before this court, appellant asserts a number of errors concerning issues decided during the trial and resolved in the judgment, including the child support determinations and the characterization of two businesses as respondent's separate property. In her brief she also challenges a number of post-judgment, post appeal matters, including orders: (1) denying a request to modify the spousal order in the judgment; (2) granting respondent's request to place the equalization payment ordered in the judgment in a child support security account; (3) granting respondent's motion to declare the appellant a vexatious litigant; and (4) relating to child custody issues. As we shall explain, we do not reach the merits of those post-judgment orders because appellant could have, but did not appeal from them, or as in the case of the child custody-related orders, they relate to issues that were not decided in the trial, nor were they part of the judgment on appeal. As for the issues concerning matters embraced by the judgment from which she properly appealed, namely, the characterization of the businesses and the child support order, we conclude that appellant did not comply with the rules of court in presenting an adequate appellate record to demonstrate error. Nonetheless, based on what evidence is before this court, we conclude that sufficient evidence supported the court's findings as to those issues, and appellant has failed to demonstrate prejudicial error. Consequently we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent and appellant married in October 1993. Respondent is a veterinarian by profession and at the time of the marriage he owned and operated a veterinary clinic in Encino. Prior to the marriage, appellant worked as a bank vice president and in 1994 appellant left her position at the bank.

The couple has two minor children, Jenna Isaacs born in 1994 and Jaymus Isaacs born in 1996. In 2000, respondent opened a second veterinary clinic in Calabasas. As later determined by the court, the couple separated on March 11, 2004. Respondent filed for dissolution of the marriage on March 16, 2004.[1]

In October 2004, the parties stipulated to bifurcate the child custody determinations from the other aspects of the dissolution proceedings. Among other things, they specifically stipulated to "permanent and final" custody orders which would be incorporated into a final judgment of dissolution of marriage. Pursuant to the stipulated orders the parties shared physical and legal custody of the children. The court entered the stipulated order on October 22, 2004.

In April 2006, respondent sought to modify the child custody order, which the court granted. The modification gave respondent sole legal and physical custody of Jenna and allowed appellant visitation with her daughter; the parties continued to share custody of Jaymus. In January 2007, based upon respondent's request the court further modified the prior custody orders and granted respondent sole legal and physical custody of both minors, pending further order of the court. Visitation for appellant with Jenna was to be determined based on Jenna's agreement and visitation for Jaymus with his mother was determined by a schedule set by the court. In the fall of 2007, respondent sought and the court granted domestic violence restraining orders pursuant to which appellant was restrained from contacting and ordered to stay away from respondent and the children.

The Trial, Statement of Decision, Judgment and Appeal.

The non-custody dissolution matters proceeded to a bench trial to determine: (1) the date of separation; (2) child and spousal support; (3) the characterization and division

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[1] In 2005, appellant began representing herself in these proceedings.

of property; and (4) the right to credits and reimbursements. The bench trial was conducted on various dates in February, March, May and June 2007.

During the trial, the parties presented evidence[2] concerning various matters, including ownership of the Encino and Calabasas clinics and appellant's purported interests in them. Respondent asserted that appellant had little involvement in the clinics. He presented evidence that in 1998 and 1999, appellant worked for less than a year in the Encino clinic doing personnel related activities and some collections and renewal work. Rather than receiving a salary for the work, appellant accepted various perquisites, including a car, cell phone, and insurance and medical expenses. Appellant testified that during the marriage she learned respondent's industry and that she worked to improve the business' financial profitability, customer service and implement new policies. She further testified that she trained office personnel and worked to improve efficiency and productivity levels.

Appellant claimed that in 1997 respondent gave her an ownership interest in the clinic. She presented evidence of stock certificates and corporate documents which purported to show that approximately 4,000 shares (40 percent) of the Encino clinic ownership had been given to her. According to respondent, the stock certificates and other corporate documents appellant presented were forgeries. He presented evidence that the tax returns and the documents on file with the California Secretary of State for the clinic from 1997 through 2005 showed that he was the 100 percent owner of the clinic.

With respect to the Calabasas clinic, respondent asserted that it was an extension of the Encino clinic and that respondent never worked there and was not involved in its creation. Respondent testified that he opened the clinic to accommodate his clientele who lived west of Encino and that approximately 25 percent of his clients from the

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[2] Appellant did not include the reporter's transcript in the appellate record. Thus, the evidence described here is that which the trial court referred to in its statement of decision.

Encino clinic transferred to the Calabasas clinic when it opened. Respondent further testified that he took out a personal loan to pay for the equipment and other start-up costs of the Calabasas clinic, and that the loan is paid as a business expense of the Encino and Calabasas clinics. Respondent testified that he alone negotiated and signed the lease for the property where the Calabasas clinic is located, but admitted that at the landlord's request appellant signed a guaranty for the lease. Respondent also presented evidence from a CPA who testified that the total value of the community interest in both clinics was $243,563.[3] Appellant argued that the court should disregard the opinion of respondent's expert, but she did not offer any expert testimony regarding the valuation of the businesses.

In the trial court's statement of decision issued on December 7, 2007, the court found that the Encino clinic was respondent's separate property. The court found appellant's evidence—both her testimony and the documents—purporting to show the gift of a portion of the clinic's ownership to her was not credible nor did it demonstrate transmutation of the property under Family Code section 852, subdivision (a). The court also found that the Calabasas clinic, though established during the marriage, was also respondent's separate property. The court found that the Calabasas clinic was created as a part of the ongoing Encino clinic and that the businesses shared a client base, staff, business materials and all aspects of operation. The court awarded the community a $243,563 interest in the clinics.

Concerning the issue of child support, the evidence at trial indicated that appellant was currently unemployed and that her only employment since 1994 was in the veterinary clinics. The evidence presented at trial indicated that before marriage

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[3] The expert testified that the value of the Encino clinic at the time of the marriage was $207,000 and $374,000 at the date of separation. He testified that the value of the Calabasas clinic at the date of separation was $228,000 and that the total value of both clinics was $602,000. He further opined that respondent's separate property interest in the Encino clinic was $358,437.

appellant had a career as a bank vice president for three years and had over 20 years of experience in the field. Respondent presented expert evidence from a vocational examiner who conducted a vocational exam of appellant. According to the expert, appellant could earn between $26-34 an hour if she were to pursue a job as a "personnel manager or administrator of a health care facility or return to banking." Appellant did not present any evidence to refute the findings of the examiner. Based on the exam, the expert opined that appellant had the present ability and opportunity to earn $5,893 per month, and the court imputed that amount of income to appellant for the purposes of calculating support.

Based on the parties' respective timeshares[4] with their children since their separation in 2004, and their respective incomes, the court ordered appellant to pay respondent $1,233 a month in child support. The court's statement of decision indicated that during the trial respondent "chose to produce limited evidence regarding the issue of child support." The court further ordered that in light of the timeshares, appellant was required to reimburse respondent for some of the pendente lite child support he had paid to her after April 2006.[5]

Concerning the issue of spousal support, it appears that respondent presented evidence and argument under Family Code section 4320, that spousal support payments

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[4] The court noted that from late November 2004 through April 2006 the parties each had a 50 percent timeshare with their children. From April 2006 until October 2006, appellant had a 25 percent timeshare with Jenna and a 50 percent timeshare with Jaymus. From October 2006 until January 2007, appellant had a 0 percent timeshare with Jenna and a 50 percent timeshare with Jaymus. After January 18, 2007, appellant had a 0 percent timeshare with both children.

[5] For the purposes of reimbursement the court noted that it was not imputing any income to appellant for the period of August 1, 2004 though April 2006, concluding that "[i]t is reasonable that the respondent be afforded a transition time to reenter the professional workforce after having worked part-time in the clinics during the course of the marriage."

should be terminated.[6] Appellant apparently presented no argument or analysis under Family Code section 4320, arguing that she was not requesting and did not want a permanent spousal support order. She wanted to be awarded one-half ownership of respondent's clinics, and based on her ownership claims sought half of respondent's post-separation earnings from the practices. In the statement of decision, the court ordered that as of December 2007, neither party would be required to pay spousal support, but the court retained jurisdiction over the matter. Respondent was ordered to prepare a judgment based on the decision and appellant was given an opportunity to submit objections to the judgment.

Approximately a week after the statement of decision was entered on December 13, 2007, appellant sought to have the court reconsider the order in the statement of decision denying her permanent spousal support. The court denied the request citing to the fact that appellant had not presented an argument or evidence in support of a spousal support order during the trial. Thereafter on December 19, 2007, appellant filed an OSC seeking to modify the support order reflected in the statement of decision under Family Code section 4320.[7]

On February 5, 2008, the trial court denied appellant's OSC to relieve the legal counsel who represented the children and to enjoin the children's further psychological treatment by Dr. Maureen King.

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[6] The court had made a number of pendente lite spousal support orders during the litigation. On August 16, 2004, respondent was ordered to pay appellant uncharacterized support (apparently consisting of both child and spousal support) in the amount of $8,967.98 a month. In November 2004, the court modified the prior order, requiring respondent to pay appellant temporary spousal support in the amount of $4,580 a month from which the court ordered appellant to pay the mortgage and taxes on the family home that appellant occupied during the proceedings.

[7] Appellant filed a nearly identical OSC to modify the support order on February 5, 2008. It was denied on May 23, 2008.

On March 5, 2008, the court ruled that a prior child custody evaluation conducted by Dr. Gary Chase was a "full" evaluation pursuant to Family Code section 3111.

On March 21, 2008, the court entered the judgment in accord with the December 7, 2007, statement of decision. The judgment also provided for an "equalizing payment" to be made by respondent to appellant of $53,342.54 based on the division of assets, debts, and reimbursements in the judgment.

On May 5, 2008, appellant filed a notice of appeal from a "judgment after trial" entered on March 21, 2008.

Post-Appeal Litigation and Orders of the Trial Court.

On May 29, 2008, the trial court ruled on appellant's December 19, 2007, OSC seeking to modify the support order in the statement of decision and to stay the enforcement of the child support order. The court found that appellant had failed to show a change of circumstances since the statement of decision and the judgment to justify a modification of the support order. The court further found that rather than devote her efforts to seek employment, appellant had, as shown by the numerous pleadings filed in the case, devoted nearly all of her time to the litigation. The court warned appellant that her efforts to relitigate support issues already resolved may demonstrate that she is "bordering upon being declared a vexatious litigant," and that if she embarked upon further litigation regarding spousal support involving substantially identical claims she may be declared a vexatious litigant. The court denied the request to modify the support order and the request to stay the enforcement of the child support order.

On May 30, 2008, respondent filed a motion to have appellant declared a vexatious litigant under Code of Civil Procedure section 391. On June 4, 2008, respondent filed a motion to create a child support security account and requested that he be permitted to place the equalizing payment ordered in the judgment into the account to satisfy the amounts appellant had failed to pay him for child support. On June 25, 2008, the trial court granted respondent's May 30, 2008, motion declaring appellant a vexatious litigant. The court also granted respondent's motion to create a child support security

account and to place the remainder of the equalizing payment he owed to appellant into the security account.

DISCUSSION

Appellant asserts a number of issues on appeal. Specifically, appellant challenges the child support and the characterization of the veterinary clinics determinations made in the trial and subsequent judgment of March 21, 2008, from which she appealed on May 5, 2008. She also, however, assails other court orders and findings that were not litigated during the trial, or included in the judgment. In addition, several of her claims on appeal concern trial court orders entered post-judgment, post-appeal, or from separately appealable orders. As we shall explain more fully herein, for a number of reasons most of appellant's claims are simply not reviewable on this appeal. We first address those matters that are beyond appellate review on this appeal, and then consider those claims that are properly before this court.

I. Appellant's Claims That Are Not Cognizable on This Appeal.

Our discussion is guided by the general principles and rules governing notices of appeal, appealable orders and appellate review. The notice of appeal confers jurisdiction to the appellate court as to the matters on appeal. Failure to file a proper notice of appeal deprives the appellate court of the power to review the challenged order or judgment and requires the dismissal of the appeal. (See *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43.)

Pursuant to the rules of court, a notice of appeal must specifically identify the order and/or judgment from which the appellant seeks appellate review. (Cal. Rules of Court, rule 8.100(a).) The notice of appeal is sufficient "if it identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a)(2).) "'[W]here several judgments and/or orders occurring close in time are separately appealable . . . , each appealable judgment and order must be expressly specified – in either a single notice of appeal or multiple notices of appeal – in order to be reviewable on appeal.'"

(*DeZerega v. Meggs, supra*, 83 Cal.App.4th at p. 43.) Although notices of appeal are, in general, liberally construed, they will not be interpreted to include an appeal from an order that is directly and independently appealable. "If an order is appealable, an aggrieved party must file a timely notice of appeal from the order to obtain appellate review." (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239.) A notice of appeal specifying a judgment alone does not encompass other judgments or other separately appealable orders: "'The law of this state does not allow, on an appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken.'" (*Ibid.* quoting *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119.)

Further, an appeal reviews the correctness of a judgment or order as of the time of its rendition, upon a record of matters that were before the trial court for its consideration. (*In re Brittany H.* (1988) 198 Cal.App.3d 533, 554.) As a general rule matters occurring subsequent to judgment and during the pendency of the appeal are irrelevant to an appeal from the judgment and are not properly before the appellate court. (*Grassilli v Barr* (2006) 142 Cal.App.4th 1260, 1292, fn. 11; *Lewis v. Hankins* (1989) 214 Cal.App.3d 195, 200.) With these concepts in mind, we turn to appellant's specific challenges.

As we review appellant's claims we also keep in mind that on May 5, 2008, appellant filed the notice of appeal from the "judgment after a court trial" entered on March 21, 2008. This notice of appeal refers to no other orders of the trial court, nor does it appear that appellant filed any other notice of appeal in this matter.

A. The Order Entered on May 29, 2008.

Appellant complains the trial court erred when on May 29, 2008, it entered an order denying her request to modify the judgment that terminated pendente lite spousal support and denied her future, permanent spousal support. This May 29, 2008, order entered post-judgment and during the pendency of this appeal was a separately appealable order. (See *In re Schmir* (1996) 134 Cal.App.4th 43, 47 [reviewing on direct appeal an order granting husband's motion to modify spousal support ordered in the judgment of dissolution].) Appellant, however, did not file an appeal from the May 29,

2008, order denying her request to modify that judgment, and thus she cannot seek appellate review of the order in this appeal.[8]

Once the court entered the order terminating spousal support, appellant's avenue to get spousal support reinstated was to seek a modification by demonstrating a change in circumstances under Family Code section 4320, and then, if her request was denied, to appeal. While she did seek to have the order modified, she failed to appeal from the order denying the request for modification. Appellant's failure to directly appeal from the May 29, 2008, order deprives this court of jurisdiction to consider whether the court erred in failing to modify the support order in the judgment.

In any event, to the extent that one could interpret appellant's arguments asserted in this appeal – her complaint that the court should have ordered permanent spousal support and that it failed to give her adequate warnings it would terminate temporary support – as an attack on the judgment itself, rather than a challenge to the May 29, 2008, order, we would reject it. Specifically, appellant did not ask for future, permanent spousal support in the trial. She did not present any evidence on the issue, suggest what level of support she would need or refute respondent's arguments and evidence that spousal support should be terminated. Thus, she cannot complain on appeal that the court abused its discretion when it failed to order permanent support. She effectively waived any complaint about the spousal support ruling in the judgment by failing to assert it below. Furthermore, appellant cannot protest the trial court failed to issue her an appropriate warning it would terminate support. Based on the pre-trial filings, it is clear that the issue of whether temporary spousal support should be terminated would be decided by the court during the trial, respondent also made plain his request to end the temporary support orders and during the trial appellant repeatedly argued that she did not

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[8] We reach the same conclusion with respect to appellant's request (also included in the OSC to modify the spousal support order and also denied in the May 29, 2008, order) to "stay" the order requiring her to pay child support. She could have sought immediate appellate review from the court's denial of her request for a stay, but she failed to do so.

want the court to order spousal support. Thus, any claim that she did not have a sufficient warning that support might be terminated in the judgment is disingenuous.

B. The Orders Entered on June 25, 2008.

On June 25, 2008, the trial court granted respondent's May 30, 2008, motion, declaring appellant a vexatious litigant. The court also granted respondent's motion filed on June 4, 2008, to create a child support security account and to place the remainder of the equalizing payment he owed to appellant into the security account.

1. Vexatious Litigant Determination. Appellant contends that the trial court erred by declaring her a vexatious litigant. We decline to consider this contention because we conclude that appellant failed to file a timely appeal from the post-judgment vexatious litigant order entered during the pendency of this appeal.

The trial court can require a vexatious litigant to post security; if the security is not posted, it can dismiss the litigation. (Code Civ. Proc., §§ 391.1-391.4.) It can also enter a prefiling order prohibiting a vexatious litigant from filing any new litigation in propria persona without first obtaining leave from the presiding judge. (Code Civ. Proc., § 391.7.)

Ordinarily, an order requiring a vexatious litigant to post security is not appealable; it is reviewable only on appeal from the subsequent final judgment. (*Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 985, fn. 1; *Roston v. Edwards* (1982) 127 Cal.App.3d 842, 846.) However, where, as here a judgment has already been entered, such a vexatious litigant order is separately appealable as an order after judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).) Moreover, arguably a prefiling order-unlike an order requiring security-is separately appealable as an injunction. (*Id.*, at subd. (a)(6); but see *People v. Harrison* (2001) 92 Cal.App.4th 780, 785, fn. 6; *In re Bittaker* (1997) 55 Cal.App.4th 1004, 1008 [dictum].)

As noted earlier, the trial court entered judgment on March 21, 2008. On June 25, 2008, it found appellant to be a vexatious litigant and entered a prefiling order as a minute order. Appellant's appeal from the judgment could not encompass the vexatious litigant order, which had not yet been entered. Once the vexatious litigant order had been

entered, she did not file another notice of appeal. It follows that we lack jurisdiction to review the order.

2. The Child Support Security Account.

Appellant complains the court erred in granting respondent's June 5, 2008, motion on June 25, 2008, to place the equalization payment in a child support security account. As with the appeal of the vexatious litigant order, we conclude that we cannot review appellant's challenge to the order creating the child support security account.

In the judgment the court ordered respondent to make an equalization payment of over $53,000 to appellant. Before this court appellant is not assailing the validity of judgment ordering the equalization payment. Instead she is complaining about the subsequent, post-judgment order in which the court granted the respondent's request to put the balance of the equalization payment in a security account because appellant had not made any of the child support payments she had been ordered to pay respondent in the judgment. Like the vexatious litigant order, this post-judgment, post-appeal order is not subject to appellate review on the appeal from this judgment.

C. Orders Relating to the Children's Care and Custody

On February 5, 2008, the trial court denied appellant's OSC to relieve the legal counsel who represented the children and to enjoin the children's further psychological treatment by Dr. Maureen King. On March 5, 2008, the court ruled that a prior child custody evaluation conducted by Dr. Gary Chase was a "full" evaluation pursuant to Family Code section 3111.

Pursuant to the parties' stipulation, the child custody issues had been bifurcated from the rest of the dissolution proceedings. The parents originally shared custody of the children, but the court subsequently entered an order granting respondent sole physical and legal custody until further order of the court. None of the issues concerning the children's custody was litigated during the trial or addressed in the judgment on appeal as is clear in appellant's trial brief, the court's statement of decision and the final judgment. Given that the custody-related matters, including those appellant raised in her appellate

brief were not a part of the trial or judgment, this court cannot consider them on this appeal.

Appellant complains, however, that the custody-related matters she has raised are reviewable on this appeal because in the judgment the court ordered her to pay future and back child support. But the fact that she was ordered to pay child support in the judgment is entirely separate and irrelevant to the matters she is complaining about here—removal of the children's legal counsel and treating therapist and the court's finding as to the thoroughness of the custody evaluation. To the extent that appellant believes the determination giving respondent custody of the children is erroneous she could have appealed from those orders. Appealing a support order, however, does not also place at issue in the appeal the custody determination where such matters have been specifically bifurcated by the parties. She has had an opportunity to litigate the custody issues below and the resulting custody orders were subject to appellate review at the time. Consequently, this court lacks jurisdiction on this appeal to considered appellant's challenges to the custody-related orders.

II. Appellant's Claims Properly Asserted in This Appeal.

Before this court appellant challenges the child support order and the characterization of the veterinary clinics as respondent's separate property. Both of these matters were litigated in the trial and are addressed in the judgment. Thus, they are properly before us on this appeal.

Specifically as to these matters, appellant argues the court's support order and the characterization of the property were not supported by sufficient evidence presented at trial. However, our review of these matters is hampered by appellant's failure to comply with appellate rules governing the submission of the appellate record.

The duty to provide a sufficient appellate record lies with appellant who must affirmatively show error by providing an adequate record. (See *Aguilar v. Avis Rent A Car System* (1999) 21 Cal.4th 121,148-149 [appellant has the burden of furnishing an appellate record sufficient to consider the issues on appeal]; *Erikson v. Sullivan* (1947) 81 Cal.2d 790, 791.) A reviewing court will presume the record in an appeal includes all

matters material to deciding the issues raised. (Cal. Rules of Court, rule 8.163.) On an appeal on the clerk's transcript alone, findings are presumptively correct. (*Seay v. Allen* (1955) 134 Cal.App.2d 440, 444.) An appellate court will assume that there was substantial evidence adduced at the trial to support the findings. (*In re Estate of Fain* (1999) 75 Cal.App.4th 973, 992 ["Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be conclusively presumed correct as to all evidentiary matters"].) In other words, the reviewing court will presume the unreported trial testimony would demonstrate the absence of error. The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence. (*Ibid.*)

This case resembles *Agnew v. Contractors Safety Association* (1963) 216 Cal.App.2d 154, 162, in which a pro persona appellant filed an appeal based upon, inter alia, a claim that during the trial the judge displayed bias against him. Appellant, however, did not designate the reporter's transcript of the trial proceedings in his appellate record. Instead, he described certain facts from the case and included conclusory declarations accusing the judge of bias. (*Id.* at pp. 158-162.) The court of appeal dismissed the appeal, concluding that since appellant failed to provide the reporter's transcript and/or failed to incorporate a condensed statement of the relevant portions of the oral proceedings which where material to the determination of bias, he could not attack the sufficiency of the evidence to support the findings of fact. (*Id.* at p. 163.)

In lieu of the reporter's transcript, an appellant under some circumstances can also sustain his or her burden to provide an adequate record by other means, including using a settled statement. California Rules of Court rule 8.137 provides that in the place of an official reporter's transcript, an indigent party can seek to proceed by way of a settled statement—i.e., a condensed narrative of the oral proceedings in the trial court that the appellant believes necessary for appeal. (Cal. Rules of Court, rule 8.137(a) & (b).)

Here, appellant has failed to provide this court with the material evidence upon which the lower court's judgment was based. Although the clerk's transcript comprises nearly 30 volumes of documents, including the pleadings, motions, and attachments, various reports and other filings, court orders and portions of the trial transcript, little of it pertains to appellant's specific challenges at issue which center on the evidence presented during the trial. For example, before this court appellant claims the trial court erred when it relied on the testimony of the vocational examiner when the court decided to impute certain income to her. However, neither the examiner's report, nor the testimony of the expert appears to be included in the appellate record. Appellant's other claims pertaining to the characterization of the veterinary clinics assail testimonial and documentary evidence presented during the trial, but are missing from the record. Similar to *Agnew*, the force of appellant's arguments depend on testimony and documents that have not been provided to this court.

Furthermore, we do not agree with appellant's contention that she has been denied an opportunity to present her appeal because she was not provided with a free reporter's transcript of the trial proceedings. The fact that appellant is in pro per, claims she is indigent and has obtained waiver of certain court fees does not entitle her to a free transcript. (See *Rohnert Park v. Superior Court* (1983) 146 Cal.App.3d 420, 431 [rejecting a claim that indigent parties are entitled to a waiver of reporter's transcript costs on appeal].) Appellant here did not avail herself of that opportunity provided by rule 8.137 to perfect the record by seeking a settled statement.

In addition to appellant failure's to carry her burden to provide an appropriate record of the trial proceedings to support her claim that the court lacked sufficient evidence to support the judgment, she has also failed to set-forth in her brief a fair and accurate summary of the evidence presented at trial. "A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence on that point, favorable and unfavorable,* and *show how and why it is insufficient.* [Citation.]" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409, italics added.) "[I]t is [appellant's] duty to set forth a fair and adequate statement of the evidence which

is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility. . .'" (*Ibid*.) Her recitation of the evidence focuses almost exclusively on the facts that support only her position. She has not provided an accurate or full description of the evidence presented below.

In any event, and putting aside the failure to comply with the court rules, the deficiencies in the appellate record and appellant's briefing, based on the record before us, appellant has not shown legal error nor that the orders lacked sufficient evidentiary support.

A. Child Support Order

Concerning the issue of support, as described in the court's statement of decision, the evidence at trial indicated that appellant was currently unemployed and that her only employment since 1994 was in the veterinary clinics. Before marriage appellant had a career as a bank vice president for three years and had over 20 years of experience in the field. The vocational expert who examined appellant opined that appellant could earn between $26-34 an hour if she were to pursue a job as a "personnel manager or administrator of a health care facility or return to banking." According to the court, appellant did not present any evidence to refute the findings of the expert. Appellant did not controvert the expert's opinion that appellant had the present ability and opportunity to earn $5,893 per month—the income amount the court imputed to appellant for the purposes of calculating support.

Based on the parties' respective custody timeshares with their children since their separation in 2004, and their respective monthly incomes, the court ordered appellant to pay respondent $1,233 a month in child support. The court's statement of decision indicated that during the trial respondent "chose to produce limited evidence regarding the issue of child support." The court further ordered that in light of the timeshares, appellant was required to reimburse respondent for some of the pendente lite child support he had paid to her after April 2006.

Before this court, appellant claims that the trial court erred in imputing income of over $5,000 a month to her and on that basis ordering her to pay past and future child support to respondent. She asserts that the court ignored the fact that she had no current employment and no ability to pay the support ordered. Appellant asserted that the court should have rejected the vocational expert's opinion because it was based on what she could have hypothetically earned.

We are not convinced. In view of the record before us, it appears that the trial court's findings and rulings were based on sufficient, uncontroverted evidence. First, based on the statement of decision it appears the court considered appellant's employment history and her status as unemployed at the time of the trial. Second, appellant has not shown error with respect to the opinions offered by the vocational expert or in the court's reliance upon them. (See *In re Marriage of Schmir*, *supra*, 134 Cal.App.4th at p.53 [upholding the trial court's imputing income to wife based solely on opinion of vocational examiner].) Apparently below appellant did not present any evidence to refute the showing. Accordingly, she has failed to carry her burden to demonstrate error on appeal.

B. Characterization of the clinics as Respondent's Separate Property

Appellant contends the trial court erred in finding that both the Encino and Calabasas clinics were respondent's separate property. As we shall explain, appellant has not demonstrated that the court committed prejudicial legal error nor had insufficient evidence to support these findings.

In general all property acquired by a married person during the marriage while domiciled in this state is community property. (Fam. Code, § 760.) Separate property is that owned before marriage or acquired during marriage by gift, will or devise. (See Fam. Code, § 770.) Property acquired during marriage may also be characterized as separate property, if its purchase is derived from separate assets or can be traced to separate assets. (See *Patterson v. Patterson* (1966) 242 Cal.App.2d 333, 340-341, overruled on other grounds in *See v. See* (1966) 64 Cal.2d 778, 783.) Nonetheless, separate property may become community property as a result of being commingled with

the latter in such a manner that tracing to the source and segregation of the interests is impossible. (*Ibid.*) Likewise separate property can be "transmuted" into community property by express written agreement of the parties. (Fam. Code, § 852, subd. (a).)

1. The Encino Clinic

The court found that the Encino clinic was established by respondent prior to the marriage and was respondent's separate property. Based on the expert evaluation of the clinic the court awarded the community a portion of the proceeds of the business. Appellant did not dispute that respondent formed the business prior to the marriage, but insisted that pursuant to Family Code section 852, a portion of the ownership of the business – 40 percent – had been "transmuted" into her property. To support this claim appellant presented stock certificates and other corporate documents. The trial court rejected appellant's arguments and evidence, as incredible. The court found that the stock certificates which appellant claimed gave her an ownership portion of the business did not qualify under Family Code section 852.

Appellant has not demonstrated error. It was well within the trial court's purview to consider the evidence and testimony on both sides of this issue and to reject those assertions which it found incredible. Appellant has not articulated, how in exercising its duties as the trier of fact on this issue, the court erred. She has not shown the evidence that supported the court's findings, namely the husband's testimony and various corporate documents including tax returns, was legally insubstantial. Likewise in view of the court's description of the stock certificates as a "very generic type," we cannot find error in the court's legal conclusion that they did not satisfy the requirements of Family Code section 852, subdivision (a). In sum, on this appellate record, and given the deferential standard of review we apply to the court's factual findings, we cannot conclude the court committed reversible error in characterizing the Encino clinic as separate property of respondent.

2. The Calabasas Clinic

Appellant argues that the court erred in characterizing the Calabasas clinic as a "separate property" asset of respondent because the business was started during the marriage. Appellant has failed to demonstrate prejudicial error.

While the fact that the clinic was created during the marriage raises the presumption of community ownership, the analysis does not end the inquiry. Respondent presented evidence to overcome the presumption of community ownership. According to the statement of decision, respondent presented, and the court apparently credited, his evidence that the Calabasas clinic was started to service the clients from his Encino clinic and that the assets used to build and support the clinic were derived from and could be traced to the Encino clinic. The court also noted that the clinics were dependent upon respondent's efforts as a doctor of veterinary medicine. Other than the fact appellant signed as a guarantor on the lease for the clinic, appellant apparently did not present any compelling evidence or argument to the trial court to demonstrate that the Calabasas clinic was a community asset.

Nonetheless, it also appears that notwithstanding the court's announcement that the Calabasas clinic was respondent's separate property, the court awarded the community an interest in that clinic that amounted to the total value of the clinic as of the date of separation. Indeed, the accountant assigned $243,563 as the total value of the *community interest* in *both* clinics. The court relied on the figure, ultimately adopting it as the value of the community's interest in both clinics. Specifically, the expert valued both clinics as of the date of separation at $602,000 (the Encino clinic at $374,000 and the Calabasas clinic at $228,000). The expert further opined that the respondent's separate property interest in the Encino clinic was $358,437. Subtracting respondent's separate property interest from the current value of Encino clinic ($374,000-$358,437) leaves a community interest in the Encino clinic of $15,563. Subtracting the value of the community interest in the Encino clinic from that of the total value assigned to the community by the expert for both clinics ($243,563-$15,563) leaves $228,000, which reflects the total value the expert assigned to the Calabasas clinic. Thus, notwithstanding

the court's characterization of the Calabasas clinic as respondent's "separate property," the court awarded the community the *entire* value of the clinic. Hence, any error with respect to the characterization of the property is harmless.

DISPOSITION

The judgment is affirmed. The respondent is entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**